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Attorney for Defendant
JOSEPH GOMES (03)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 03-00179 HG 03
)	
Plaintiff,)	REPLY TO GOVERNMENT'S
)	SUPPLEMENTAL RESPONSE;
vs.)	CERTIFICATE OF SERVICE
)	
JOSEPH GOMES,	(03),)
)	
Defendant.)	
)	

REPLY TO GOVERNMENT'S SUPPLEMENTAL RESPONSE

COMES NOW DEFENDANT JOSEPH GOMES, by his undersigned court-appointed CJA attorney, Richard S. Kawana, and herewith submits his Reply to Government's Supplemental Response to Defendant Gomes' Motion for Medical Evaluation and Treatment" filed July 22, 2008. After the filing of the government's supplemental pleading, this court ordered that defendant provide a response by August 26, 2008. Accordingly, leave of the court is respectfully

requested to file this overdue reply.

The government's supplemental response stated that: "Our position is that the District Court is without jurisdiction to direct that a sentence defendant be confined in a particular Bureau of Prison ("BOP") facility, or be placed in a particular BOP treatment program." Government's memo, at 2-3.

The government then concludes that its "position is that any re-designation or **medical evaluation as to Defendant Gomes** must necessarily be left to the sound discretion of the Bureau of Prisons." [boldface supplied]. Government's memo, at 4.

It is respectfully submitted that the government is wrong and that any U.S. district court has inherent jurisdiction to review the discretion exercised by the BOP concerning medical care. In the context of a 42 U.S.C. § 1983 case, the Ninth Circuit held that deliberate indifference can be manifest in the manner in which prison doctors provide care. In Jett v. Peterson, 439 F.3d 1091 (9th Cir. 2006), the prisoner suffered a broken thumb, was taken to the local hospital for treatment, but the prison doctors did not follow the emergency doctor's recommendation that the prisoner receive further care.¹ This failure in follow-up

¹Billups v. Howard, 207 Fed.Appx. 874 (9th Cir. 2006), and Fews v. Perez, No. 05-16937 (9th Cir. 2007), both unpublished cases, are in accord.

care while in BOP custody was sufficient to take the matter to trial. In United States v. Pineyo, 372 F.Supp.2d 133 (D. Mass. 2005), the district court delayed sentencing to take testimony, review extensive medical records and briefs, and grant discovery on the issue of whether the BOP could provide the “needed . . . medical care, or other correctional treatment in the most effective manner” as required by 18 U.S.C. § 3553(a)(2)(D). Finding that the BOP did not meet its burden of care as required, the district court sentenced the defendant to time served.

Clearly, in the appropriate circumstances, such as exist here, the district court can fashion an order that the BOP provide a medical evaluation and requisite medical care. Accordingly, it is respectfully submitted that the Defendant’s Motion for Medical Evaluation and Treatment be Granted.

Dated: Honolulu, Hawaii, August 29, 2008.

/s/ Richard S. Kawana
RICHARD S. KAWANA
Attorney for Defendant
JOSEPH GOMES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) CR. NO. 03-00179 HG 03
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Plaintiff,) CERTIFICATE OF SERVICE
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)
JOSEPH GOMES, (03),)
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Defendant.)
)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served Electronically through CM/ECF: By U.S. Mail:

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DATED: Honolulu, Hawaii, August 29, 2008.

/s/ Richard S. Kawana
RICHARD S. KAWANA
Attorney for Defendant